No. 746

IN THE

Supreme Court of the United States

FEBRUARY TERM, 1944

RUDOLPH SPITZER, *et al.*,

Petitioners.

IN THE MATTER OF

STANDARD GAS & ELECTRIC COMPANY,

Debtor.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW A DECREE OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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Your petitioner, Rudolph Spitzer and Emil K. Ellis, his attorney, and one Rose Young, pray that a writ of certiorari be issued to review a decree of the United States Circuit Court of Appeals for the Third Circuit, affirming an order entered in the United States District Court perpetually restraining Rudolph Spitzer, a stockholder of Standard Gas & Electric Company, Emil K. Ellis, his attorney, and one Rose Young, a stockholder and all stockholders of Standard Gas & Electric Company, a Debtor in re-organization proceedings under Section 77 B, of the Bankruptcy Act from intervening in a law suit brought by the Special Trustee in the Supreme Court of the State of New York to recover damages from third parties for waste and diversion of the corporate assets of Standard Gas & Electric Company.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 139 Fed. (2d) 149. The opinion of the Circuit Court of Appeals was filed on December 1st, 1943. The jurisdiction of this Court is invoked under Section 347 Judicial Code, Title 28, and Rule 38 of the Rules of the Supreme Court.

Questions Presented.

1. Where a plenary action for money damages against third parties was brought in a State Court by a Special Trustee of a debtor in reorganization proceedings, did the District Court have the power to stay an application made in that State Court by a stockholder of the debtor for leave to intervene therein?

2. Was the stay issued by the District Court enjoining appellants from applying for intervention in the plenary action in the State Court a violation of Section 265 of the Judicial Code prohibiting writs of injunction by Federal Courts against proceedings in a State Court?

3. Is a chose in action to recover money damages from third parties vested in a Special Trustee of the debtor a *res* within the exclusive jurisdiction of the District Court under Section 77 B, 11 U. S. C. A. 207, Sub. A?

4. Has the District Court the power to issue process beyond its territorial jurisdiction directed against a non-resident attorney and his client to stay an application for intervention in an action in a State Court not involving any *res?*

5. Is a stay issued against a party applying for intervention in a plenary action in a State Court, a violation of Section 265 of the Judicial Code notwithstanding the fact that the writ is not directed against the State Court itself?

Statement.

The District Court of Delaware on February 20th, 1943, made an order perpetually restraining and enjoining Rudolph Spitzer, a stockholder of Standard Gas & Electric Company (Debtor in re-organization proceedings under Sec. 77 B), and his attorney, Emil K. Ellis, both of New York City, and all other stockholders of said company, from intervening in a law suit then pending in the Supreme Court of the State of New York, New York County, brought by one Daniel O. Hastings, as Special Trustee of the Debtor, against former directors of said company and third parties, to recover for waste and diversion of corporate assets. One of the appellants below, Rose Young, is one of the stockholders enjoined under the order.

The Special Trustee was appointed by the Delaware District Court in reorganization proceedings under §77B on November 26th, 1937 (R. 14). His appointment was limited to the causes of action upon which the suit was brought for which the District Court reserved jurisdiction (R. 16). On August 2nd, 1938 the District Court made an order finding that the plan of reorganization had been fully and completely executed; discharging the debtor from its debts, and decreeing that the status of the debtor as a debtor was ended, except for the reservation of jurisdiction referred to (R. 34).

The affidavit supporting the application for a stay declared that the proposed intervention in the New York suit would constitute a violation of a prior order of the court made on October 25th, 1935, staying all actions against the

debtor (the suit in New York, however, is not against the debtor) and an order made on March 5th, 1938 staying the institution of any action or suit based on the subject matter of the causes of action assigned to the Special Trustee. The supporting affidavit claimed that the proposed intervention would be a "prejudicial interference with the enforcement of said action" (R. 40). Other than that conclusion no facts were stated to sustain the charge of apprehended prejudice or interference.

Suit was brought by the Special Trustee in the New York Court (where intervention was sought) after the dismissal of his complaint in the District Court of Delaware, in an action previously instituted by him, upon the ground that process could not be served upon non-resident defendants in a plenary action (In re: *Standard Gas & Electric Company*, 30 Fed. Supp. 21, 119 Fed. (2) 658). The suit thereupon instituted by the Special Trustee in the New York courts was originally dismissed upon the ground that the Special Trustee had no legal capacity to sue in a foreign jurisdiction. The New York Court of Appeals, however, reversed the dismissal, holding that the Special Trustee had capacity to sue because he had been vested with title to the causes of action and because the courts of New York would in any event recognize his right to sue as a matter of comity (*Hastings* v. *H. M. Byllesby & Co., et al.*, 286 N. Y. 468, 36 N. E. (2) 666).

Thereafter, Rudolph Spitzer, through his attorney, Emil K. Ellis, made an application in the New York Supreme Court for leave to intervene as a party plaintiff, in the plenary action brought by the Special Trustee therein. The attorney for such Special Trustee then obtained from the District Court of Delaware an order to show cause to restrain such intervention. The order to show cause so granted by the District Court of Delaware was not served on the appellant Rudolph Spitzer, but was left at the

office of appellant Emil K. Ellis, his New York attorney (R. 26). Neither Mr. Spitzer, Mr. Ellis nor Rose Young had previously appeared in the reorganization proceeding. Although the order appealed from enjoins all stockholders, no notice was given to the stockholders. An affidavit in opposition to the application for a stay was made and submitted by Mr. Ellis. It was in the nature of a special appearance contesting the jurisdiction of the Court to send its process out of its District, and to make the order appealed from.

The affirmance of the order by the Circuit Court of Appeals is grounded upon the broad propositions that (a) the chose in action now being prosecuted by the Special Trustee in the plenary action in New York State constitutes property and assets of the debtor in Bankruptcy and a *res* over which the District Court had acquired exclusive and summary jurisdiction and (b) the injunction issued by the District Court is not directed to the New York State Court but to the party applying to said court for intervention. The injunction runs against all stockholders of the debtor, and specifically against Spitzer and his legal representatives.

Specifications of Errors To Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the choses in action now being prosecuted by the Special Trustee in a plenary action in New York State constitute a *res* of the Debtor over which the District Court has exclusive and summary jurisdiction.

2. In holding that notwithstanding the provisions of Section 265 of the Judicial Code (prohibiting writs of injunction against proceedings in State courts), the District Court had the power to issue an injunction restraining a

stockholder of the Debtor from applying for intervention in a plenary State Court action brought by the Special Trustee of the Debtor.

3. In holding that since the injunction issued by the District Court was not directed to the New York State Court but solely against the party applying for intervention in the action pending therein, such stay did not constitute a violation of Section 265 of the Judicial Code.

4. In holding that the choses of action being prosecuted by the Special Trustee in a plenary action in the State Court constitute a *res* sufficient to empower the District Court to serve process on non-residents beyond its territorial limits.

5. In holding that an application for intervention in a plenary action in a State Court constituted an invasion interference or attempted disposition of a Debtor's *res*.

6. In holding that the appellants should have sought the District Court's permission for leave to intervene in the State Court suit.

7. In failing to hold that the power of the New York Courts to control their own litigation was not subject to Federal Court order.

8. In failing to hold that the District Court should not have assumed the power to halt the appellants from applying for intervention in a State Court action and thus prevent the State Court from deciding, in the control of its own litigation, whether or not such intervention should be allowed.

9. In failing to hold that the intervention applied for in the New York Court did not in any way challenge, interfere with or defeat the jurisdiction of the District Court.

10. In holding that because the causes of action prosecuted in the State Court belonged exclusively to the Special Trustee, a stockholder had no further derivative rights and hence could not intervene in the State Court action, notwithstanding the fact that the suit was being prosecuted for the ultimate benefit of the creditors and stockholders only and not the Debtor, whose status had ended.

11. In failing to hold that since the Special Trustee voluntarily invoked the jurisdiction of the New York court, that court acquired general jurisdiction to control the litigation and decide, without interference by the District Court, what constitutes a proper case for the allowance of intervention.

Reasons for Granting the Writ.

The decision of the Court beow is in conflict with

(a) the decision of the United States Supreme Court in *Toucey* v. *New York Life Insurance Company*, 314 U. S. 118, wherein this Honorable Court said that the purpose underlying the statutory interdiction of Section 265 of the Judicial Code is that proceedings in State Courts should be free from interference by Federal injunction; that there was but one exception, to wit, the *res* cases, whereas the State Court proceeding herein involved is a plenary action;

(b) the decision of the Circuit Court of Appeals for the Third Circuit in *In re Standard Gas & Electric Company*, 30 Fed. Supp. 21, 119 Fed. (2d) 658 (the former Debtor herein), which held that the very action herein involved, being prosecuted in the New York State Supreme Court by the Special Trustee, was a plenary action not involving any *res* and therefore not justifying any service of process

on non-residents beyond the territorial jurisdiction of the district court;

(c) the decision of *Henderson* v. *Fleckinger*, 48 Fed. Supp. 236, in which the court held that under Section 265 of the Judicial Code, the fact,

> "that the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial" (p. 240).

The foregoing conflicts are irreconcilable and require authoritative resolution by this Honorable Court so that there may be no uncertainty as to the power of federal courts to interfere with proceedings in State courts in any cases other than *res* cases as pronounced by this Honorable Court in the *Toucey* case (*supra*).

In that case, Mr. Justice Frankfurter, writing for the Court, said at page 132:

> "* * * proceedings in the State Courts should be free from interference by federal injunction. The provision expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court."

Said the Court at page 139:

> "We find, therefore, that apart from congressional authorization, only one exception has been imbedded in section 265* by judicial construction, to wit, the *res*

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* Section 265 of the Judicial Code, Section 369 of Title 28 of the United States Code provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

cases. The fact that one exception has found its way into Section 265 is no justification for making another."

The case at bar is definitely not within the exception. It is not a *res* case—it is a plenary suit for money damages.

The power of injunction is statutory. Section 516 of Title 11 of the United States Code provides:

"* * * (4). In addition to the relief provided by Section 29 of this Title enjoin or stay until final decree, the commencement or continuation *of a suit against the debtor or any act or proceeding to enforce a lien upon the property of the debtor.*"

The action in which intervention was sought in the New York courts, and in which appellants were enjoined, is not against a debtor or to enforce a lien upon a debtor's property.

In deciding that the Federal Court could enjoin intervention in a State Court suit in the nature of a derivative stockholder's action, the court below has in effect enlarged the class of exemption provided in the statute.

Section 77B (11 U. S. C. A. 207, subd. a), conferring upon the bankruptcy court "exclusive jurisdiction of the debtor and its property wherever located" is inapplicable except in *res* cases.

The debtor has by order of this Court been divested of its property; its status as a debtor has terminated, and the Special Trustee has been vested with title to the causes of action sued upon.

See *In re: Adolph Gobel, Inc.*, 80 Fed. (2) 849, where the Circuit Court of Appeals, Second Circuit condemned an injunction in a case not against the debtor or any involving any *res*. Said the Court:

"But mere financial interest of a bankrupt estate in the outcome of litigation pending in the state courts does not authorize the issuance of an injunction against such prosecution. In re: Worral, 79 F. (2d) 99 (C. C. A. 2); In re: Horton, 102 F. 986 (C. C. A. 8)."

There the Court further said:

"This difference between the power of the court in ordinary bankruptcy proceedings and in proceedings under section 77B does not hinder this appellant, for here the property involved in the Illinois action was not only in no sense in the debtor's possession, but it was not the debtor's property. It was the property of the Decker corporation. As we said in Re: Prudence Bonds Corp., 75 F. (2d) 262, 263: 'Congress did not intend the bankruptcy court in proceedings under section 77B (11 U. S. C. A. Sec. 207) to take over all litigation between the debtor and third persons.' Nothing in section 77B therefore granted to the court the power it exercised in this injunction."

See also *Continental Illinois National Bank & Trust Co.* v. *Chicago Rock Island Ry.*, 294 U. S. 648; *Hill* v. *Martin*, 296 U. S. 393, 404; *Aetna Casualty & Surety Co.* v. *Yeatts, et al.*, 99 Fed. 665, page 670.

See: *Oklahoma Packing Co.* v. *Oklahoma Gas & E. Co.*, 309 U. S. 4, 8, 9.

It is significant to note that the Court below on a prior occasion, and in the *same reorganization proceedings*, held that the action brought by the Special Trustee was a "plenary action to determine a controversy and not a reorganization proceeding."* The Circuit Court then said:

* In re: *Standard Gas & Electric Company*, 119 Fed. (2) 658.

"Jurisdiction over a person outside the lower court's jurisdiction, is given to the lower court, only if such person is in some manner invading, interfering, or disposing of the debtor's *res*, and then only to the extent of preventing or forestalling the invasion, interference or disposition of such *res*. The act gives no jurisdiction to the trial court to issue its process outside its district in proceedings purely in personam, in which no protection of the debtor's *res* is involved."

The decision of the court below is further in conflict with the former decision rendered by it* where the court in the same proceeding held, among other things:

"* * * while a reorganization court may issue all necessary process in support of its summary jurisdiction over the debtor's property, it may not without other statutory authority than is afforded by section 77B direct such process to be served upon defendants outside its own district when the suit is a plenary one brought under its diversity of citizenship jurisdiction by adverse claimants for the recovery of an unliquidated claim."

while the present opinion of the same court which we seek to review contains this statement:

"The injunction issued for the protection of the *res* being an exercise of the bankruptcy court's summary jurisdiction it follows that the process necessary to render the injunction effective could proceed beyond the territorial limits of the court for service upon those to be enjoined thereby."

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* In re: *Standard Gas and Electric Company*, 30 Fed. Supp. 21, 119 Fed. (2) 658.

These decisions are in apparent irreconcilable conflict with each other. It is significant to note, that in the instant case, not only did the District Court send its process beyond its territorial limits directed to an attorney who was a non-resident and who had not appeared in the reorganization proceedings, but it does not appear that any notice of the proposed injunction against *all* stockholders was given to *any* stockholder.

In *Thompson* v. *Terminal Shares,* 104 Fed. (2) 9, the Court said:

> "To sustain the lower court's jurisdiction of this suit would do violence to the general policy of Congress that persons shall not be subject to civil suits except in the districts of which they are inhabitants."

In the case at bar the court in its opinion said:

> "In any event, a sufficient answer to the appellants' contention in this connection lies in the fact that the injunction issued *by the District Court is not directed to the New York state court. Nor does it in any wise interfere with the jurisdiction of that court.*" (Italics ours.)

Such a statement is inconsistent and in conflict with the decision in *Henderson* v. *Fleckinger* (*supra*) and other decisions. In the *Henderson* case, the court said:

> "that the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial" (citing cases) (p. 240).

(d) The stay granted by the District Court deprived citizens of New York of the right to pursue a remedy afforded them by the New York State Law (New York State Con-

stitution Article 1, Sec. 1, Sections 63 and 192 New York Civil Practice Act).

We maintain that under the Constitution of the United States, Fifth Amendment, it is the right of any citizen interested in a litigation to apply to a court having jurisdiction of the subject matter, for leave to intervene therein. While such an application is directed to the discretion of the court, it is nevertheless a right which a citizen is entitled to have submitted for decision. The stay granted by the District Court in effect annuls that right and to that extent deprives the stockholders who are citizens of New York of a right to pursue a remedy afforded by the State Law (N. Y. State Constitution, Art. 1, Sec. 6). The decision of the lower court would indicate that the Federal Court rather than the New York State Supreme Court had the power to control the State Court litigation. The court below said:

> "Like the debtor they are subject, wherever they may be reached, to the orders of the District Court with respect to the debtor's property and assets, including the choses in suit in New York."

We respectfully contend that the matter of intervention in a State Court suit, concededly involving no *res*, is a matter for the State Court to decide, and that the stay constituted an invasion of the jurisdiction and power of the New York State Supreme Court. The Special Trustee, like any other suitor, is amenable to the orders and rules of the State Court. The Federal Court may not endow him with any special privileges or immunities. Intervention is a matter for the discretion of the New York Court (*National Bondholders Corporation, et al.* v. *Joyce*, 276 N. Y. 92, 11 N. E. (2d) 552).

The Supreme Court of the State of New York is a court

of general jurisdiction. *New York State Constitution,* Art. 6, Sec. 1; *Decker* v. *Canzoneri,* 256 App. Div. (N. Y. 68, 9 N. Y. S. (2) 210.

See also N. Y., Civil Practice Act, Secs. 62, 63 and 64.

The granting or denial of intervention in an existing action is a procedural process derived from the inherent general jurisdiction of the Supreme Court.

> *Brennan* v. *Hall,* 131 N. Y. 160, 29 N. E. 1009;
> *Meyer* v. *Title Guarantee & Trust Company,* 228 App. Div. (N. Y.) 641, 238 N. Y. S. 48;
> *Dresdner* v. *Goldman Sachs Trading Corp.,* 240 App. Div. (N. Y.) 242, 269 N. Y. S. 360.

Section 192 of the Civil Practice Act of the State of New York provides:

> "New parties may be added or substituted and parties misjoined may be dropped by order of the court at any stage of the cause as justice may require."

As was stated in the case of *Rejsenhoff* v. *Colonial Nav. Co.,* 35 Fed. Supp. 577, at page 579:

> "The regulation of its courts' jurisdiction is wholly a matter for the State."

We maintain that jurisdiction and control over the action in the State Court shoud not be shared by the Delaware District Court, which previously had dismissed the action for its own lack of jurisdiction. The question of intervention was solely for the State Court to decide and the Delaware District Court possessed no power of direction or control of the litigation in the State Court. By issuing the stay preventing intervention the District Court of Delaware assumed a share of the control of litigation over which it previously acknowledged it had no jurisdiction.

The incongruity of the decision of the Court below is obvious for the reason that while the Special Trustee recognized the necessity of bringing his action in the New York State courts, being finally compelled to appeal to the New York Court of Appeals to determine that he was a proper party plaintiff, he now takes the anomalous position that the same court may not now say who may or may not be a co-plaintiff.

CONCLUSION

If the position of the Circuit Court of Appeals is to be sustained then it marks the beginning of an unlimited power of federal courts to encroach upon the jurisdiction of a State Court to control its own litigation. It means writing into Section 265 by judicial construction a new exception, which in time will lead to others. It means that once a federal court has assumed jurisdiction of a reorganization proceeding, a trustee may seek remedies in a State Court free and uncontrolled by any of the rules of the State Court. It means that the federal Courts are re-writing procedural rules of the State Courts and regulating their procedure.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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